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Case No. 96-1358

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

MARIA M. OCHOA,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner, Maria M. Ochoa, by her counsel, hereby submits her brief in reply to the brief in opposition to her petition for certiorari filed by the Respondents' Solicitor General and the Federal Communications Commission ("FCC").

The contentions of the Respondents show why the Court should grant the petition of Ochoa. The Respondents attempt to unduly limit the scope of established precedent of this Court, and in support of their position, they present wholly inconsistent arguments.

(a) The Petition Should Be Granted in Order to Resolve the Issue as to Whether In Re Ruffalo, 390 U.S. 544 (1968), is Applicable to FCC Broadcast Licensing Administrative Hearings.

In her petition, at pp. 13-21, Ochoa contended that the FCC denied her "due process" under the Fifth Amendment of the U.S. Constitution by sanctioning and disqualifying her for deceit based upon testimony which she gave at an FCC broadcast licensing administrative hearing. In so doing, the FCC failed to give her notice at the hearing as to charges of disqualifying deceit based upon such testimony.

The imposition of sanctions by the FCC in these circumstances is prohibited by In Re Ruffalo, 390 U.S. 544, 551-552 (1968). Therein, the Court held that

where a sanction or penalty is imposed by an agency, the affected person is entitled to "procedural due process," which includes "fair notice" at the hearing of the charges of disqualifying misconduct.

In their opposition, at p. 9, the Respondents contend that In Re Ruffalo does not apply to FCC broadcast licensing administrative hearings because no sanctions or penalties are involved in merely denying a broadcast license to a competing applicant vying for a public resource. However, the FCC did not merely deny Ochoa's application for a broadcast license because she was not the most qualified of all the competing applicants. Rather, it sanctioned Ochoa for deceit (App. 48a, 51a, 81a, 97a). This sanction carries with it possible criminal penalties for perjury before a Federal agency. See, 18 U.S.C. 1621.

Regardless of the characterization of the nature of the FCC's action against Ochoa, In Re Ruffalo would nevertheless be applicable. There, the petitioner was disbarred from the practice of law. Here, Ochoa was disbarred or disqualified from holding a Federal broadcast license. There is no decisionally significant distinction between these two actions for purposes of whether "procedural due process" by a government agency is required.

Accordingly, the contentions of the Respondents that In Re Ruffalo does not

apply to FCC broadcast licensing administrative hearings are wholly erroneous. Such arguments demonstrate why certiorari should be granted.

Although In Re Ruffalo has been the law of the land since at least 1968, the FCC refuses to be bound by its holding. Thus, certiorari should be granted to determine the scope and applicability of In Re Ruffalo to FCC broadcast licensing administrative hearings and to other similar types of Federal administrative hearings.

In their opposition, at p. 10, the Respondents contend that Ochoa knew that her credibility and truthfulness were at issue in the FCC administrative hearing. However, this contention is contradicted and undermined by the U.S. Court of Appeals for the D.C. Circuit which observed that Ochoa "should have been on notice that her candor was specifically in issue" (App. 133a).

Regardless of what Ochoa knew at the hearing, or should have known, as to the nature of the issues in controversy, it is undisputed that during the hearing the Administrative Law Judge ("ALJ") never told Ochoa that he considered her hearing testimony to be evasive, lacking candor, untruthful, or contradictory with her previous testimony, and the ALJ never gave her an opportunity at the hearing to clarify or correct any hearing testimony which he subsequently first determined

after the hearing to be disqualifying deceit (App. 141a-151a).

However, such notice to a person while testifying is required by In Re Ruffalo, 390 U.S. at 551-552. It holds that charges cannot be made or be amended on the basis of the testimony of the accused at the hearing, if he or she is given no opportunity at the hearing to expunge the testimony in question.

Accordingly, the refusal of the FCC to be bound by the "procedural due process" requirements of In Re Ruffalo demonstrates why certiorari should be granted. Federal administrative agencies must be subject to the same "procedural due process" requirements as are other governmental entities.

(b) The Petition Should Be Granted in Order to Resolve the Issue as to Whether Steadman v. SEC, 450 U.S. 91, 101 (1981) is Applicable to FCC Broadcast Licensing Administrative Hearings.

In her petition, at pp. 22-24, Ochoa contended that the FCC's reliance upon mere "inferences" from her hearing testimony to find conflicts in her testimony, or to find deceit by her, to serve as a basis to impose the sanction of disqualification is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1981). This precedent mandates use of the higher "preponderance of [substantial] evidence" standard" and not the minimal "substantial

evidence" standard to impose the sanction of disqualification against a person in a Federal administrative hearing.

In their opposition, at p. 10, the Respondents contend that Steadman v. SEC is not applicable to the case of Ochoa because she was not sanctioned, but merely had her broadcast license application denied. However, as previously noted, the FCC sanctioned Ochoa for deceit (App. 48a, 51a, 81a, 97a). This sanction carries with it possible criminal penalties for perjury before a Federal agency. See, 18 U.S.C. 1621.

In their opposition, at p. 10, the Respondents also contend that Steadman v. SEC is not applicable to the case of Ochoa because the FCC did not have the burden of proof. However, under its own established policies, the FCC did have the burden of proof, but refused to assume it. D&E Broadcasting, Inc., 1 FCC2d 78, 80 (1965).

In their opposition, at p. 11, the Respondents concede that the FCC disqualified Ochoa based upon "inferences" from her hearing testimony. However, according to the Respondents, "inferences" meet the higher "preponderance of [substantial] evidence" standard.

The Respondents ignore that, in Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906, para. 18 (1991), the FCC acknowledged that "inferences" from hearing testimony do not meet the

"preponderance of [substantial] evidence" standard of proof. Rather, such "inferences" only constitute minimal "substantial evidence."

Accordingly, certiorari should be granted to determine whether Steadman v. SEC is applicable to FCC broadcast licensing proceedings where sanctions for deceit are imposed against an applicant. Moreover, certiorari should be granted to determine whether, as a matter of law, "inferences" from hearing testimony (in making findings to impose the sanction of disqualifying deceit) meet the higher "preponderance of [substantial] evidence" standard, or only meet the minimal "substantial evidence" standard.

This is an important Federal question of law which should be resolved because the FCC refuses to be bound by the dictates of Steadman v. SEC. All Federal administrative agencies should be bound by the same rule of law.

(c) The Petition Should Be Granted Because the Respondents Made Wholly Inconsistent Contentions in Their Opposition Brief.

In her petition, at pp. 25-30, Ochoa contended that she has standing as a "private attorney general" to challenge the grant of the competing applicant, Foothills Broadcasting, Inc., in order to raise issues of disparate and discriminatory treatment by the FCC where it improperly favored a white male

applicant over her, a minority female applicant. Although the ALJ found that Foothills engaged in disqualifying deceit as to its application proposal, the FCC reversed those credibility findings on specious grounds and granted its application (App. 18a-24a, 44a-46a).

In their opposition, at pp. 11-12, the Respondents do not directly address the contentions of Ochoa. Rather, they contend that Ochoa does not have standing to challenge the grant of a competing application because she was disqualified by the FCC for lack of candor.

However, this contention is wholly inconsistent with other contentions made by the Respondents in their opposition. They contend, at pp. 9-10, that In Re Ruffalo, 390 U.S. 544 and Steadman v. SEC, 450 U.S. 91, 101, do not apply to the case of Ochoa because her application was merely denied and she was not sanctioned.

However, the Respondents cannot have it both ways. If Ochoa was not sanctioned for disqualifying deceit, she would be eligible to reapply for the broadcast license in question. If she is eligible to reapply, she has undisputed standing to challenge the grant of the application of Foothills, the competing applicant for the broadcast license in question. Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 395 (D.C. Cir. 1993).

The Respondents also ignore that the

FCC previously gave Ochoa standing to challenge the grant of the competing application of Foothills. This was done after Ochoa was sanctioned for disqualifying deceit (App. 119a). The FCC is again attempting to have it both ways.

The inconsistent contentions of the Respondents demonstrate why certiorari should be granted. The FCC has no consistent or coherent policy as to standing by a disqualified applicant to contest the improper grant of a competing applicant. Thus, certiorari should be granted to resolve this important question of Federal law.

Conclusions

WHEREFORE, in view of the foregoing, the petition of Ochoa raises important questions of Federal law, with respect to administrative agencies, which should be resolved by the Court. Accordingly, certiorari should be granted.

Respectfully submitted,

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